

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Region 21

RIM HOSPITALITY,

Respondent,

and

NELSON CHICO, an Individual

Charging Party.

Case 21-CA-137250

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**BRIEF IN SUPPORT OF  
RESPONDENT RIM HOSPITALITY'S  
EXCEPTIONS TO THE DECISION OF THE  
ADMINISTRATIVE LAW JUDGE**

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## TABLE OF CONTENTS

|   | Page |
|---|------|
| I. INTRODUCTION .....   | 1    |
| II. STATEMENT OF THE CASE.....  | 2    |
| A. The Parties .....  | 2    |
| B. RIM’s Orientation Team.....  | 2    |
| C. RIM’s Retention of Employees & the Orientation Process .....   | 4    |
| D. The Arbitration Agreement.....   | 4    |
| E. RIM’s Subsequent Use of the Arbitration Agreement.....   | 5    |
| F. Chico’s Lawsuit And NLRB Charge .....  | 6    |
| G. Post-Ruling Settlement & NLRB Complaint.....   | 7    |
| H. Hearing Before the ALJ and the ALJ Decision .....  | 7    |
| III. LEGAL ARGUMENT.....  | 8    |
| A. Chico’s Putative Class-Action Lawsuit Was Not “Protected Concerted Activity” Under The NLRA.....   | 10   |
| B. Chico Lacks Standing To Pursue The NLRB Charge .....   | 12   |
| C. Voluntary Arbitration Agreements Are Not Barred By The NLRA.....   | 12   |
| 1. The NLRA Does Not Create A Substantive Right To Pursue Class Actions .....   | 13   |
| 2. The Arbitration Agreement Is Voluntary.....  | 14   |
| 3. D.R. Horton And Its Progeny Do Not Prohibit Voluntary, Bilateral Arbitration Agreements .....  | 16   |
| D. First Amendment Right To Petition Applies; RIM Cannot Be Punished For Successfully Asserting A Petition To Arbitrate Based On The Agreement Chico Voluntarily Executed ..... | 18   |
| E. Preemption – The FAA Compels Enforcement Of The Agreement.....   | 21   |
| 1. The FAA’s “Savings Clause” Does Not Foreclose The Enforcement Of RIM’s Arbitration Agreement.....  | 22   |
| 2. No “Contrary Congressional Command” Exists To Override The Enforceability Of RIM’s Arbitration Agreement .....   | 23   |
| F. The Board Does Not Have The Authority to Overrule Judge Walter’s Order .....   | 27   |
| G. The NLRB Complaint Is Barred Under The Doctrine Of Res Judicata .....  | 28   |
| G. Chico’s NLRA Claim is Untimely.....  | 30   |
| H. Chico Incurred No Attorneys’ Fees Opposing RIM’s Motion to Compel Arbitration And, Accordingly, The ALJ Erred In Ordering RIM to Pay Such Fees. ....                         | 31   |

**TABLE OF CONTENTS**  
**(continued)**

|                     | <b>Page</b> |
|---------------------|-------------|
| IV. CONCLUSION..... | 31          |

## TABLE OF AUTHORITIES

|   | Page           |
|---|----------------|
| <b>Cases</b>  |                |
| <i>Alleluia Cushion Company</i><br>221 NLRB 999 (1975).....   | 10             |
| <i>Amchem Prods., Inc. v. Windsor</i><br>521 U.S. 591 (1997) .....                                  | 26             |
| <i>American Express Co. v. Italian Colors Rest.</i><br>570 U.S. ___, 133 S. Ct. 2304 (2013).....    | 20, 22, 24, 26 |
| <i>American Freightways Co.</i><br>124 NLRB 146 (1959).....   | 9              |
| <i>AT&amp;T Mobility v. Concepcion</i><br>563 U.S. 333 (2011) .....                                 | passim         |
| <i>BE &amp; K Const. Co. v. NLRB</i><br>536 U.S. 516 (2002) .....                                   | 19             |
| <i>Bill Johnson’s Restaurants, Inc. v. NLRB</i><br>461 U.S. 731 (1983) .....                        | 19, 20         |
| <i>Blonder-Tongue Labs., Inc. v. University of Illinois Foundation</i><br>402 U.S. 313 (1971) ..... | 28             |
| <i>Charles Dowd Box Co. v. Courtney</i><br>368 U.S. 502 (1962) .....                                | 28             |
| <i>Circuit City Stores, Inc. v. Adams</i><br>532 U.S. 105 (2001) .....                              | 22             |
| <i>Compucredit Corp. v. Greenwood</i><br>132 S.Ct. 665 (2012) .....                                 | 20, 24, 25     |
| <i>Dean Witter Reynolds Inc. v. Byrd</i><br>470 U.S. 213 (1985) .....                               | 22             |
| <i>Deleon v. Verizon Wireless, LLC</i><br>207 Cal.App.4th 800 (2012).....                           | 5              |
| <i>Deposit Guar. Nat’l Bank v. Roper</i><br>445 U.S. 326 (1980) .....                               | 13, 26         |
| <i>E.I. Du Pont De Nemours &amp; Co. v. NLRB</i><br>707 F.2d 1076 (9th Cir. 1983).....              | 10             |

# **TABLE OF AUTHORITIES** (continued)

|  | <b>Page</b> |
|--|-------------|
| <i>Emporium Capwell Co. v. Western Addition</i><br>420 U.S. 50 (1975) .....  | 14          |
| <i>Fardig v. Hobby Lobby Stores</i><br>No. SACV 14-561 JVS(ANx)<br>2014 WL 2810025 (C.D. Cal. June 13, 2014) ..... | 20          |
| <i>Gilmer v. Interstate/Johnson Lane Corp.</i><br>500 U.S. 20 (1991) .....   | 21, 24, 25  |
| <i>Halstead Metal Products v. NLRB</i><br>940 F.2d 66 (4th Cir. 1991) .....  | 12          |
| <i>Hoffman Plastic Compounds v. NLRB</i><br>535 U.S. 137 (2002) .....  | 21          |
| <i>Holling Press, Inc.</i><br>343 NLRB 301 (2004) .....  | 10          |
| <i>Iskanian v. CLS Transportation Los Angeles, LLC</i><br>59 Cal.4th 348 (2014) .....                              | 20          |
| <i>Johnmohammadi v. Bloomingdale's Inc.</i><br>755 F.3d 1072 (9th Cir. 2014) .....                                 | 18          |
| <i>Keith Miller</i><br>334 NLRB 824 (2001) .....   | 9           |
| <i>K-Mart Corp.</i><br>341 NLRB 702 (2004) .....   | 10          |
| <i>Marine Cooks &amp; Stewards, AFL v. Panama S.S. Co.</i><br>362 U.S. 365 (1960) .....                            | 25          |
| <i>Meyers Industries, Inc.</i><br>268 NLRB 493 (1984) .....  | 10, 11      |
| <i>Meyers Industries, Inc.</i><br>281 NLRB 882 (1986) .....  | 10, 11, 12  |
| <i>Miami Sys. Corp.</i><br>320 NLRB 71 (1995) .....  | 9           |
| <i>Moses H. Hosp. v. Mercury Constr. Corp.</i><br>460 U.S. 1 (1983) .....  | 24          |

**TABLE OF AUTHORITIES**  
(continued)

|   | Page      |
|---|-----------|
| <i>Nanavati v. Adecco USA, Inc.</i><br>99 F.Supp.3d 1072 (N.D. Cal. 2015).....                | 18        |
| <i>Nijjar Realty</i><br>363 NLRB No. 38 (2015).....   | 18        |
| <i>NLRB v. Fluor Daniel</i><br>161 F.3d 953 (6th Cir. 1998).....                              | 9         |
| <i>NLRB v. Heyman</i><br>541 F.2d 796 (9th Cir. 1976).....                                    | 27, 28    |
| <i>Norfolk Southern Corp. v. Chevron, U.S.A., Inc.</i><br>371 F.3d 1285 (11th Cir. 2004)..... | 29        |
| <i>On Assignment Staffing Services., Inc.</i><br>362 NLRB No. 189 (2015).....                 | 1, 14, 15 |
| <i>Owen v. Bristol Care, Inc.</i><br>702 F.3d 1050 (8th Cir. 2013).....                       | 24        |
| <i>Owens v. Kaiser Found. Health Plan, Inc.</i><br>244 F.3d 708 (9th Cir. 2001).....          | 28, 29    |
| <i>Penn Plaza LLC v. Pyett</i><br>556 U.S. 247 (2009).....                                    | 18        |
| <i>Price v. Starbucks Corp.</i><br>192 Cal.App.4th 1136 .....                                 | 12        |
| <i>Randas v. YMCA of Metropolitan Los Angeles</i><br>17 Cal.App.4th 158 (1993).....           | 5         |
| <i>Richards v. Jefferson County, Ala.</i><br>517 U.S. 793 (1996).....                         | 29        |
| <i>Rockwell Int’l. Corp. v. NLRB</i><br>814 F.2d 1530 (11th Cir. 1987).....                   | 10, 11    |
| <i>San Fernando Post-Acute Hosp.</i><br>363 NLRB No. 57 (2015).....                           | 15        |
| <i>Shearson/American Express Inc. v. McMahon</i><br>482 U.S. 220 (1987).....                  | 24        |
| <i>Southern S.S. Co. v. NLRB</i><br>316 U.S. 31 (1942).....                                   | 21        |

**TABLE OF AUTHORITIES**  
(continued)

|   | Page   |
|---|--------|
| <i>Stoll v. Gottlieb</i><br>305 U.S. 165 (1938) .....   | 28     |
| <i>Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.</i><br>559 U.S. 662 (2010) .....  | 20     |
| <i>Super Market Serv. Corp. v. Heller</i><br>227 NLRB 1919 (1977) .....   | 10     |
| <i>Sutherland v. Ernst &amp; Young LLP</i><br>726 F.3d 290 (2nd Cir. 2013) .....  | 24     |
| <i>Valley Health Sys. LLC and Kathy Morris and Katrina Alvarez-Hyman</i><br>No. 28-CA-123611<br>2015 WL 1254854 (NLRB Div. of Judges, San Francisco, Mar. 18, 2015) ..... | 17     |
| <i>Waffle House Inc.</i><br>363 NLRB No. 104 (2016) .....   | 15     |
| <i>Wal-Mart Stores, Inc. v. Dukes</i><br>564 U.S. 338 (2011) .....  | 12     |
| <i>Webster v. Guillermo Perales</i><br>No. 3:07-CV-00919-M<br>2008 WL 282305 (N.D. Tex. Feb. 1, 2008) .....   | 16     |
| <i>Whittaker Corp.</i><br>289 NLRB 933 (1988) .....   | 10     |
| <b>Statutes</b>   |        |
| 29 U.S.C.<br>Section 101 .....  | 25     |
| Section 103 .....   | 25     |
| Section 104 .....   | 25     |
| Section 157 .....   | 9, 18  |
| Section 158(a)(1) .....   | 8      |
| Section 216(b) .....  | 24     |
| 9 U.S.C.<br>Section 2 .....   | 21, 22 |
| Section 3 .....   | 21     |

**TABLE OF AUTHORITIES**  
**(continued)**

|                                  | <b>Page</b> |
|----------------------------------|-------------|
| Section 4 .....                  | 21          |
| Code of Civil Procedure          |             |
| Section 1283.05 .....            | 5           |
| <b>Other Authorities</b>         |             |
| 1 Witkin, Summary Cal. Law       |             |
| (9th ed. 1987) Section 120 ..... | 5           |
| Ballentine's Law Dict.           |             |
| (3d ed. 1969).....               | 15          |

## I. INTRODUCTION

As the evidence at the hearing made clear, this is not a run-of-the-mill *D.R.Horton/Murphy Oil* case. Unlike those cases, the arbitration agreement at issue in the present case was entirely voluntary and did not contain a class action waiver. The ALJ erred in concluding otherwise. The evidence adduced at the hearing established that neither the Charging Party, Nelson Chico, nor his coworkers, were required to sign the arbitration agreement as a condition of employment with Respondent RIM Hospitality. And that the voluntary nature of the arbitration agreement is clearly set forth in the agreement.

The NLRB's recent *On Assignment Staffing* decision, like the *D.R. Horton* and *Murphy Oil* cases before it, stands for the proposition that arbitration agreements prohibiting class actions interfere with employees' Section 7 rights only where they are mandatory in fact or in effect.<sup>1</sup> Here, the arbitration agreement Chico signed was not mandatory in any sense of the word. The agreement expressly stated it was voluntary. Unlike the agreement in *On Assignment Staffing*, it was not presumed operative; RIM employees did not have to opt out to avoid the agreement's effect. They could have simply not signed the agreement. Nor was there any pressure to agree to arbitrate. Indeed, approximately ten percent of RIM's workforce refused to sign the arbitration agreement and not one of those employees suffered adverse employment action as a consequence. The agreement here, thus, stands in stark contrast to the agreements in *On Staffing Assignment*, *D.R. Horton*, and *Murphy Oil*.

For this reason, and for the additional reasons discussed further herein, the Board should not adopt the ALJ's decision and the complaint against RIM should be dismissed.

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<sup>1</sup> As discussed in more detail below, the Board in *On Assignment Staffing* held that the arbitration agreements at issue fell within the scope of *D.R. Horton* and *Murphy Oil* because, although they were optional on their face, they gave employees only 10 days to opt out of the agreements and the employer pressured employees not to opt out, making the agreements effectively mandatory.

## **II. STATEMENT OF THE CASE**

### **A. The Parties**

Respondent RIM Hospitality (“RIM”) was a hotel management company headquartered in Modesto, California.<sup>2</sup> (Joint Exhibit (“JE”) 1, ¶ 5(a).) In October 2011, RIM began managing the Doubletree by Hilton (formerly the Kyoto Grand Hotel & Gardens) in Los Angeles, California (the “Hotel”). (*Id.*; Reporter’s Transcript, April 26, 2016 Hearing [“R.T.”], 19:24-20:6; 46:24-47:8.)

Before RIM managed the Hotel, it was operated by Crestline Hotels & Resorts, LLC (“Crestline”). (R.T., 46:24-47:10; JE 16(f), ¶ 3.) Crestline managed the Hotel between November 2007 and October 2011. (JE 16(d), ¶ 4.)

Charging Party Nelson Chico (“Chico”) is a former employee of both Crestline and RIM. (JE 1, ¶ 7; JE 14(b), ¶ 3; JE 16(f), ¶ 3.) Chico worked at the Hotel for Crestline during its entire management period and he worked for RIM between October 2011 and October 2012. (*Id.*) RIM terminated Chico’s employment on October 24, 2012 after he was caught stealing an ice machine. (JE 6.)

### **B. RIM’s Orientation Team**

When RIM commenced management of the Hotel in October 2011, it sent a four-member team to conduct new employee orientations. (R.T. 47:11-13; 50:14-21.) This team consisted of Kari Schlagheck, a RIM Director of Human Resources with over 19 years of HR experience (R.T. 44:16—45:17), Charlene Porche, Dale Wielgus, and Eileen Babow (R.T. 50:14-21; see also R.T. 20:20—21:18 (although he could not name anyone, Chico acknowledged during his testimony that RIM sent a four-member team to conduct orientation).) At the time, Schlagheck’s responsibilities included conducting orientation meetings at new hotels transitioned to RIM’s management – or, as she called it, “onboarding.” (R.T. 45:24-19.) Over the course of her tenure with RIM, Schlagheck onboarded employees at over 100 hotels. (R.T. 46:20—47:10; 49:19-21.)

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<sup>2</sup> In July of 2015 RIM sold its assets to a different hotel management company and has since ceased operations.

Specifically, the onboarding process at the Hotel involved meeting with new employees, welcoming them to RIM, telling them about RIM's history, calming their nerves, going through RIM's policies, procedures and benefits, and presenting "new hire paperwork." (R.T. 47:14-48:8; 50:2-8.)

The employee orientation at the Hotel was conducted over several days; Schlagheck, with her team, was present for and involved in the entire process. (R.T. 49:19-25; 50:2-8.) During the hearing, Chico caused some confusion when he testified that, in addition to RIM's four-member team, a fifth person named "John Jetty" "led the meeting[s]." (R.T. 21:1-23.) According to Chico, Jetty made a general statement about employees needing to "fill out all the paperwork" and promising that everything else would stay the same as it was during Crestline's management. (R.T. 22:1-8.) Chico claimed Jetty said that if employees did not fill out "this paperwork," "we would be fired – or let go." (R.T. 22:12-16.) Chico provided no other details; nor could he remember how many pages of "paperwork" he was presented. (R.T. 22:22-24.)

Chico's testimony about John Jetty conflicted with Chico's prior declaration he submitted in opposition to RIM's petition to compel arbitration (discussed *infra*) in which he recounted the same meeting. (JE 14(b).) In his declaration, Chico did not identify John Jetty as leading the orientation meeting. (*Id.*) Nor did Chico state that he was told he would be "fired – or let go" if he did not sign "paperwork." (*Id.*) In contrast, Chico was specific about the circumstances leading to his execution of Crestline's arbitration agreement when it took over management several years earlier, identifying the Crestline's HR representative by name and stating that she told him that if he "did not sign [the paperwork], [he] would be out of the company." (See, JE 16(f), ¶ 5.)

During her testimony, Schlagheck provided important clarification. Schlagheck testified that no one named John Jetty was at, or involved in, RIM's orientation process; although Schlagheck testified that a John Jettie from Crestline's HR department was present, he was not involved in running RIM's orientation. (R.T. 50:22-52:2.) In fact, Jettie was actually onboarded at the orientation along with Chico and all the other former Crestline employees. (R.T. 57:16-

24.) As such, if Jettie indeed made the statement(s) Chico claims (which, as noted, Chico neglected to mention in his prior sworn declaration), there is no evidence in the record that Jettie was speaking on behalf of RIM.

**C. RIM's Retention of Employees & the Orientation Process**

The main purpose of RIM's orientation was to welcome the Hotel's staff to RIM's team. (R.T. 47:11-48:8; 50:2-8.) The orientations were conducted in English and Spanish. (R.T. 52:3-9; 21:24-25; 23:2-6.) Since all existing hotel staff (particularly "line level employees") were "presumed to be hired by RIM" when it took over management, the orientation meeting also served as an opportunity for RIM to assure existing employees that they would retain their current roles and seniority. (R.T. 47:14—48:21.) According to Schlagheck, "it's not like people [were] interviewing for their job." (R.T. 49:2.) Unless employees failed to pass the I-9 process, RIM retained them to work at the Hotel. (R.T. 57:10-18.)

On average, the orientation sessions lasted about two hours (but the orientation team took as much time as necessary to complete the process). (R.T. 52:10-12; R.T. 61:16-22.) If employees could not make it through all of the paperwork at the orientation, they were permitted to do so at a later time. (R.T. 60:10-21.)

**D. The Arbitration Agreement**

During the orientation, employees were presented with a "new hire packet." (R.T. 52:18—53:6.) The packet included the arbitration agreement. (*Id.*) No record evidence even suggests, much less shows, that employees were required to sign the agreement or even that they were told it was required. The orientation team explained each document. (R.T. 59:4-7.) The new hire packet included W-4 and I-9 forms and these were the only documents employees were required to sign. (R.T. 53:7-12.) Employees were not told they had to sign the arbitration agreement. (R.T. 54:24-55:3.)

The arbitration agreement, which was in English and Spanish, itself stated it was "voluntary." (R.T. 55:4-9; JE 7 and JE 8.) The agreement consisted of two pages clearly marked at the top "Agreement for Binding Arbitration." (JE 8.) Under the terms of the

agreement, RIM and the accepting employee both agreed to arbitrate any disputes arising between them. (*Id.*) However, the arbitration agreement expressly exempted claims made with any local, state, or federal administrative body. (*Id.*) Moreover, the agreement did not contain a class action waiver. (*Id.*)

Employees were not told during the orientation that they had to sign the arbitration agreement. (R.T. 56:6-12.) Execution of the arbitration agreement was not a condition of employment and, in fact, some employees refused to sign it. (R.T. 55:10-18; 56:13-17.) Approximately 10% of RIM's employees did not sign the arbitration agreement. (JE 1, ¶ 9; 74:23—75:1.) No employee at the Hotel was denied continued employment because he or she did not sign the arbitration agreement. (R.T. 55:18-23).

Chico testified that he read about a quarter of the first page of the agreement (through the citation to C.C.P. § 1283.05), before he decided to stop reading. (R.T. 40:12-15; see, JE 8.)<sup>3</sup> Chico signed the agreement, so he also saw the second page. (JE 7; R.T. 24:11-24.) Although he claims he understood “very little,” Chico conceded he asked no questions about the agreement. (R.T. 25:4-9.) Chico admitted that no one from RIM told him not to read the agreement. (R.T. 34:21-23.) And no one from RIM rushed Chico to sign the agreement. (R.T. 34:24-35:2.) Importantly, Chico testified that he understood the meaning of the word “voluntary” in the paragraph immediately above his signature. (R.T. 36:13-17; JE 7 and JE 8.)

#### **E. RIM's Subsequent Use of the Arbitration Agreement**

After RIM took over management of the Hotel, it continued to present new employees with arbitration agreements as an alternative forum for dispute resolution. Starting in early 2012, Jeanette Garcia was RIM's HR Manager at the Hotel until RIM ceased operations. (R.T. 64:23—65:13.) She oversaw the hiring process and walked new employees through the new hire paperwork. (R.T. 66:3-21.) Garcia never presented applicants with the arbitration agreement

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<sup>3</sup> Failure to read an agreement before signing does not render it unenforceable. *Deleon v. Verizon Wireless, LLC*, 207 Cal.App.4th 800, 813 (2012); *Randas v. YMCA of Metropolitan Los Angeles*, 17 Cal.App.4th 158, 163 (1993) (quoting 1 Witkin, Summary Cal. Law (9th ed. 1987), § 120, at 145).

before they were hired. (R.T. 74:4-6.) When Garcia presented new employees with the arbitration agreement, she told them it was voluntary. (R.T. 74:7-14; 80:7-11.) Garcia never told any employees they had to sign the arbitration agreement to keep their job. (R.T. 74:15-19.)

If a new employee refused to sign the arbitration agreement, Garcia just moved on with the hiring process. (R.T. 76:12-22.) To Garcia's knowledge, no one was fired, demoted, or disciplined for refusing to sign the arbitration agreement. (R.T. 76:23—77:14.) Nor were employees who initially refuse to sign the agreement later asked to do so. (*Id.*) There were absolutely no consequences for refusing to sign the arbitration agreement. (*Id.*)

#### **F. Chico's Lawsuit And NLRB Charge**

On April 1, 2014 (over a year and half after he was terminated), Chico filed a lawsuit in Los Angeles County Superior Court alleging that Crestline and RIM violated various wage-and-hour provisions of California's Labor Code (the "Action"). (JE 10.) Chico was the only named plaintiff. (*Id.*) In addition to seeking relief for himself, Chico asserted putative claims on behalf of similarly situated employees. (*Id.*) There is no evidence Chico pursued his lawsuit or claims with the consent or knowledge of any similarly situated current or former employees.

On July 23, 2014, RIM filed a Notice of Removal of the Action from Los Angeles County Superior Court to the United States District Court for the Central District of California (Case No. CV 14-5750-JFW) (the "Central District" litigation). (JE 11.) On July 28, 2014, RIM sent a letter to Chico's counsel demanding Chico submit his claims to individual arbitration pursuant to the arbitration agreement. (JE 12.) Chico's counsel did not respond. Accordingly, on August 5, 2014, RIM filed a Petition to Compel Arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ["FAA"]. (JE 13(a)-(d).)

On August 25, 2014, Chico filed an opposition, arguing, among other things, that—based on the NLRB's ruling in *D.R. Horton, Inc.* 357 NLRB No. 184 (2012) ("*D.R. Horton*")—RIM's efforts to "restrict class wide arbitration" "interfered with Plaintiff's right to engage in concerted activities" under Sections 7 and 8 of the NLRA. (JE 14(a)-(b).) On August 29, 2014, RIM filed a reply brief citing numerous federal court decisions—including the Fifth Circuit Court of

Appeal decision overruling *D.R. Horton*<sup>4</sup>—expressly rejecting Chico’s argument that an order requiring him to submit his claims to individual arbitration would run afoul of the NLRA. (JE 15.)

While the Court’s ruling on RIM’s Petition to Compel Arbitration was pending, Chico filed this NLRB Charge. (JE 2.)

On October 7, 2014, the Honorable Judge John F. Walter granted RIM’s Petition to Compel Arbitration and ordered Chico to submit his claims against RIM to binding, individual arbitration. (JE 17.) In his decision, Judge Walter rejected Chico’s contention that the arbitration agreement violated the NLRA, finding that “every district court in this circuit to consider [*D.R. Horton*] has declined to follow it.” (JE 17, at p. JE001102.)

**G. Post-Ruling Settlement & NLRB Complaint**

After Chico was ordered to arbitration, RIM took no further action to enforce the arbitration agreement. (JE 1, ¶ 12(b).) In fact, RIM entered into a settlement agreement with Chico, agreeing to pay him \$55,000 in exchange for a full and final release of all his individual claims. (JE 1, ¶ 13; JE 18.) As part of the settlement, Chico agreed to withdraw his NLRB charge. (JE 18.) Chico’s Action against RIM has been dismissed with prejudice. (JE 1, ¶ 14; JE 19.) Chico has also formally withdrawn his NLRB charge. (JE 1, ¶ 15; JE 20.) The NLRB Regional Director, however, rejected Chico’s withdrawal of the charge. Despite Chico’s withdrawing his claim his attorney questioned witnesses at the hearing before the ALJ.

**H. Hearing Before the ALJ and the ALJ Decision**

The charge against RIM was heard by the ALJ on April 26, 2016. The Board is no doubt familiar with the ALJ’s decision but, in short, the ALJ made the following core findings:

- The arbitration agreement was not voluntary despite the arbitration agreement expressly stating that it was voluntary;
- The arbitration agreement was unenforceable because involuntary arbitration

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<sup>4</sup> See *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

agreements governed by the NLRA are not enforceable;

- Even if the agreement were voluntary, it would not be enforceable because all pre-dispute arbitration agreements are unenforceable under the NLRA;
- Because RIM has used the arbitration agreement in the U.S. District Court to oppose the use of class action procedures, the agreement is unenforceable;
- The filing of a putative class action complaint is protected activity under the NLRA;
- A former employee has standing to pursue NLRA charges against his or her former employer;
- The action was not time-barred;
- That the First Amendment does not preclude the NLRB from punishing RIM for taking a position in district court that is reasonable and justified under existing case law, whether or not RIM was successful in advancing that position; and
- The district court's rulings in that civil litigation are not binding on the board.

Based on these findings, the ALJ recommended that RIM be ordered to revise or rescind its arbitration agreement and notify Chico and other current and former employees about the change. The ALJ also recommended that RIM be required reimburse Chico for his legal fees incurred when he opposed RIM's motion to compel arbitration in the district court, even though RIM prevailed on that motion.

### **III. LEGAL ARGUMENT**<sup>5</sup>

Section 8(a)(1) of the NLRA states that it is "an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. § 158(a)(1). Section 7, in turn, establishes that employees have the right to "self-organization, to form, join or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (29 U.S.C. § 157.)

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<sup>55</sup> Exceptions 23 and 24 are to the ALJ's proposed remedy and order and are therefore addressed by each argument in this brief.

The Board has adopted an objective test for determining whether a Section 8(a)(1) violation has occurred: “[I]nterference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer’s motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.” *American Freightways Co.*, 124 NLRB 146, 147 (1959); *see also Miami Sys. Corp.*, 320 NLRB 71, n.4 (1995), *enf’d* in relevant part sub nom., 111 F.3d 1284 (6th Cir. 1997) (“The test to determine interference, restraint, or coercion under Section 8(a)(1) is an objective one”); *see also Keith Miller*, 334 NLRB 824 (2001). The General Counsel bears the ultimate burden of proving interference, restraint, or coercion in violation of the NLRA. *NLRB v. Fluor Daniel*, 161 F.3d 953, 965 (6th Cir. 1998).

RIM acknowledges the Board’s *D.R. Horton* and *Murphy Oil* decisions. Those decisions, however, have been universally rejected by the Circuit Courts of Appeals and the NLRB has not appealed those decisions to the United States Supreme Court. At the same time, the NLRB contends that, absent the High Court’s intervention, it must rely on its own administrative decisions and ignore the authority of the Circuit Courts. Setting this controversy aside, however, *D.R. Horton* and *Murphy Oil*, even if accepted as valid authority, do not compel an adverse finding against RIM.

The ALJ invalidated the arbitration agreement Chico signed based on three grounds (with which RIM takes exception): (1) although not expressly so, the agreement could be and was interpreted by the federal district court to mutually restrict Chico’s and RIM’s right to pursue employment claims on a class or collective basis; and (2) Chico was (and other employees were) required to sign the agreement as a condition of employment — i.e., it was not signed voluntarily; and (3) even if the agreement was not mandatory, it is unenforceable. For the reasons outlined below, these arguments fail for lack of evidence and as a matter of law.

A. Chico's Putative Class-Action Lawsuit Was Not "Protected Concerted Activity" Under The NLRA<sup>6</sup>

The ALJ concluded the "filing of an employment-related class or collective action by an individual constitutes concerted activity under the Act." (ALJ Dec., 7:23-24.) This ruling was in error.

Section 7 of the NLRA protects concerted activity such that an employee must act "with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Rockwell Int'l. Corp. v. NLRB*, 814 F.2d 1530, 1534 (11th Cir. 1987); *Super Market Serv. Corp. v. Heller*, 227 NLRB 1919, 1927 (1977) (finding no concerted activity based in part on fact that co-employees mentioned in the letter had "no part in writing the letter, no notice when it was to be written [and] no opportunity to make suggestions as to its contents"); *see also E.I. Du Pont De Nemours & Co. v. NLRB*, 707 F.2d 1076, 1078 (9th Cir. 1983) ("The requirement of 'concert' denies protection to activity that, even if taken in pursuit of goals that would meet the test of 'mutual aid or protection,' is only the isolated conduct of a single employee"). Unilateral action by a single employee, even if for the benefit of other employees on a matter "of common concern," is not protected. *Whittaker Corp.*, 289 NLRB 933 (1988); *see also Holling Press, Inc.*, 343 NLRB 301 (2004); *K-Mart Corp.*, 341 NLRB 702 (2004).

There is no presumption that Chico was engaged in concerted activity simply by virtue of the fact that he filed a class action complaint. In *Meyers Industries, Inc.*, 268 NLRB 493 (1984) (*Meyers I*), the Board overturned the doctrine of "constructive concerted activity," previously announced in *Alleluia Cushion Company*, 221 NLRB 999 (1975). That doctrine allowed an ALJ or the Board to presume that concerted activity existed. In a follow-up case, *Meyers Industries, Inc.*, 281 NLRB 882 (1986) (*Meyers II*), the Board clarified that concerted activity occurs when "individual employees seek to initiate or to induce or to prepare for group action." *Id.* at 887 (emphasis added). "[T]he question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence." *Id.* at 886. As such, whether an

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<sup>6</sup> Exceptions 17 and 18.

employee is engaged in concerted activity must be established by evidence of group activity, not an individual complaint. *Rockwell Int'l.*, 814 F.2d at 1534. Here, no such evidence was presented at the hearing.

Chico's wage action was filed in his name alone with no other named plaintiffs. There is nothing in the record to indicate Chico spoke with others about the action or pursuing wage claims against RIM, that he or his counsel spoke with any other RIM employee regarding their employment, or that any other RIM employee even knew about Chico's lawsuit. No other RIM employees joined the Action. In fact, when Chico filed the Action in April 2014, he had not been an employee at the Hotel for over a year and a half. There is no evidence that Chico was acting on behalf of or in concert with other employees.

Indeed, the evidence strongly indicates to the contrary. After Chico filed his action, it was removed to federal court and the case was ordered to bilateral arbitration. Notices of a putative class action were never sent to putative class members. The case was never certified as a class action and it cannot be presumed that the case would have been certified.

Perhaps the most compelling evidence that Chico acted entirely in his own self-interest, and that he was not engaged in "concerted activity," is the fact that Chico individually settled his claims against both Crestline and RIM without the participation of any other employees, without their input or consent, and without conferring on them any benefits. While RIM does not know how much Crestline paid Chico, RIM paid him \$55,000.00 – not a dollar of which was earmarked for other allegedly aggrieved employees. After reaching this settlement, Chico acknowledged that his NLRB complaint was moot and he withdrew it. (See JE 18, ¶2.2, p. JE001105; JE 20.) Chico then dismissed the wage action with prejudice, thereby abandoning the fellow coworkers he purported to represent. (See JE 19.) Chico entered the settlements with Crestline and RIM with the full knowledge and consent of his counsel.

These facts are fatal to the NLRA complaint. (*Meyers II*, 281 NLRB at 887 ["We reiterate, our definition of concerted activity in *Meyers I* encompasses...individual employees bringing truly group complaints to the attention of management."].) Chico did not engage in

concerted activity within the meaning of Section 7 and his complaint should therefore be dismissed. *See, e.g., Meyers Indus.*, 281 NLRB at 889 (“As we find that [the employee] acted alone and did not engage in concerted activities within the meaning of Section 7, we shall dismiss the complaint”).

**B. Chico Lacks Standing To Pursue The NLRB Charge**<sup>7</sup>

As a corollary to the foregoing, Chico lacks standing to assert a charge under the NLRA for alleged unlawful practices by RIM. As noted, RIM terminated Chico’s employment in October 2012 – over a year and a half before he filed his wage action and close to two years before he filed his charge in this case. Contrary to the ALJ’s findings (see ALJ Dec., 7:25-32), as a former employee Chico has no right to engage in “protected concerted activities” to improve working conditions at the Hotel. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363-364 (2011) (“plaintiffs no longer employed [by defendant] lack standing to seek [similar] injunctive or declaratory relief against its employment practices”); *see also Halstead Metal Products v. NLRB*, 940 F.2d 66, 70 (4th Cir. 1991); *see also, Price v. Starbucks Corp.*, 192 Cal.App.4th 1136, 1142, n.5. Even if the NLRB will not honor the Circuit Court decisions, the Supreme Court’s decision in *Wal-Mart Stores* binds the Board.

**C. Voluntary Arbitration Agreements Are Not Barred By The NLRA**<sup>8</sup>

Even assuming Chico’s wage Action involved “concerted activity” (which it did not) and that he had standing to pursue these claims (which he did not), Chico’s NLRB charge still fails because he voluntarily entered into the arbitration agreement with RIM. The ALJ found the arbitration agreement was mandatory and concluded that, mandatory or not, the agreement was not enforceable. (ALJ Dec. at 3-6.)

The NLRA does not prohibit voluntary, bilateral arbitration agreements that do not expressly require employees to waive their right to pursue class actions – like the agreement at issue here. Rather, the core element of the NLRB’s holdings in *D.R. Horton* and its progeny are

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<sup>7</sup> Exceptions 17, 18 and 20.

<sup>8</sup> Exceptions 1-12 and 22.

that employers may not require arbitration agreements with class-action waivers “as a condition of employment.” According to the Board, requiring employees to enter into such an agreement interferes with Section 7 rights. Although federal courts have consistently rejected these decisions and their reasoning, the Board’s reasoning in those cases clearly undercuts the General Counsel’s argument here.

1. **The NLRA Does Not Create A Substantive Right To Pursue Class Actions**

To begin, the NLRA does not create a non-waivable substantive right to pursue wage-and-hour class actions. To interpret Section 7 of the NLRA in such a manner would turn it into a “procedural superhalo,” as Member Johnson aptly described it in his dissent in *Murphy Oil*, and is well outside the scope of the Board’s authority or any reasonable interpretation of Congressional intent regarding the scope of Section 7. The Board’s position is contrary to the Supreme Court’s long-held determination that access to F.R.C.P. 23 is “a procedural right only.” *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 332 (1980).

The timing of the respective procedural enactments further undercuts the Board’s position. While the NLRA was enacted in 1935, the collective action procedures within the FLSA were not added until 1947. Modern class action practice did not arise until amendments to the Federal Rules of Civil Procedure in 1966. The FLSA and FRCP changes occurred well after the “mutual aid and protection” language was enacted through Section 7 of the NLRA. Obviously, in 1935, Congress did not intend to protect group litigation procedures within the scope of Section 7 when those procedures would not come into existence for another 31 years. *See Murphy Oil*, 361 NLRB No. 72, slip op. at 44 (2014) (Member Johnson, dissenting).

In short, any claim that the NLRA creates substantive rights to pursue class claims “inappropriately substitutes the Board’s judgment for that of the Congress. Congress has occupied the field in determining the scope of the rights afforded by Rule 23... and has given the Board no role to play in the administration of those provisions. ... And, regardless of whether the Board might believe that the procedures provided by these statutes are somehow ‘rendered

inadequate' or even 'violated' because of a class action waiver, the Board cannot then construe Section 7 to provide an additional remedy. That kind of determination is the province of Congress." *Murphy Oil*, 361 NLRB No. 72, slip op. 44 (Member Johnson, dissenting) (citing *Emporium Capwell Co. v. Western Addition*, 420 U.S. 50, 72-73 (1975)).

## **2. The Arbitration Agreement Is Voluntary**

Chico's arbitration agreement was voluntary. RIM is not arguing that because Chico voluntarily accepted employment, he voluntarily entered into the arbitration agreement. Rather, the evidence shows that RIM would have hired Chico whether or not he executed the arbitration agreement. Thus, the agreement itself accurately stated that it was "voluntary."

Notwithstanding the foregoing, the Board muddled the waters recently in *On Assignment Staffing Services, Inc.*, 362 NLRB No. 189, at 1 (2015). In that case, the Board purported to address the "more difficult question" left open by *D.R. Horton*, 357 NLRB No. 184 (Jan. 3, 2012). It held that an employer cannot lawfully "require its employees, as a condition of employment, to be bound to an agreement that limits resolution of all employment-related claims to individual arbitration, unless employees follow a procedure to opt out of the agreement before it takes effect 10 days after receiving it." *On Assignment Staffing Servs.*, 362 NLRB No. 189, at 1 (emphasis added). According to the Board, the specific opt-out right was too short and cumbersome to exercise freely, rendering the opt-out right effectively illusory. This meant that the policy at issue remained a mandatory condition of employment, causing it to "fall[] squarely within the rule announced in *D.R. Horton* and reaffirmed in *Murphy Oil*." See *On Assignment Staffing Servs.*, 362 NLRB No. 189, at 3-5.

The ALJ incorrectly applies this rule to the facts of the present case. The facts of this case differ significantly from those in *On Assignment Staffing*. The agreement in this case expressly stated that it was voluntary. The agreement in *On Assignment Staffing*, on the other hand, was presumed effective unless the employee took the extra (and arguably burdensome) step of opting out. This distinction makes all the difference. In *On Assignment Staffing*, the

Board explained that giving employees only ten days to opt out rendered the arbitration policy a mandatory condition of employment. Including a ten-day opt-out provision was not the same thing as “merely proffer[ing] employees an agreement [because] it requires employees to very quickly take affirmative steps if they wish not to be bound by the agreement—and it does so at the very beginning of their employment, almost certainly before any employment-related dispute has arisen.” *On Assignment Staffing*, 362 NLRB No. 189, at 8.

Here, the ALJ concluded that the agreement Chico signed failed to clearly state that signing was not a required condition of employment. (ALJ Dec., 4:4-5.) That is plainly incorrect. The agreement states plainly that signing it is “voluntary.” The ALJ’s parsing of the word “voluntary” to reinterpret it to mean “involuntary” is contrary to the plain language of the agreement and contrary to common sense. None of the very reasonable Merriam-Webster definitions cited in the ALJ decision (4:13-20) mean involuntary, or anything close to it. Under each of the definitions, a voluntary agreement is one done of one’s own free will or choice or by giving consent. So, too, is the legal definition of voluntary clear and unambiguous. Voluntary means, “Intended. Not by compulsion or accident.” Ballentine’s Law Dict. (3d ed. 1969) at 1350.

The cases the ALJ relies upon are inapposite. Those cases involve arbitration agreements that are explicitly mandatory, but where the employer claimed, disingenuously and despite the plain language of the contract, the agreements were not mandatory. *See Waffle House Inc.*, 363 NLRB No. 104 (2016); *San Fernando Post-Acute Hosp.*, 363 NLRB No. 57 (2015). Here, as in those cases, the plain language of the agreement controls. In *Waffle House* and *San Fernando Post-Acute Hospital*, the plain language established that the arbitration agreement was a mandatory condition of employment. Here, the plain language established that the agreement was voluntary. No reasonable interpretation of the word voluntary means “involuntary.”

Accordingly, Chico never had to sign the arbitration agreement. In fact, at the time RIM took over management of the Hotel he was already “presumed” to be an employee. Completion of “hiring” paperwork was more form than function. Approximately ten percent of RIM’s

workforce did reject the arbitration agreement without suffering any adverse consequence. (Clearly, at least some employees understood that “voluntary” means “voluntary.”) During RIM’s orientation, the only thing it required Chico to provide was information to confirm his eligibility to work. Chico thus did not have to take prompt, affirmative steps to reject the arbitration agreement. He did not have to do anything. Quite the contrary, Chico actually had to take action to enter into the arbitration agreement.

3. **D.R. Horton And Its Progeny Do Not Prohibit Voluntary, Bilateral Arbitration Agreements**

In *D.R. Horton*, the Board’s decision turned on the fact that the employer “imposed on all employees as a condition of hiring or continued employment” an agreement to arbitrate with a class-action waiver. Because the agreement to arbitrate was mandatory, the Board treated it “as the Board treats other unilaterally implemented workplace rules.” *D.R. Horton*, 357 NLRB No. 184, slip op. at 4 (2012). The Board thus distinguished the agreement in *D.R. Horton* from the arbitration agreement at issue in *Webster v. Guillermo Perales*, No. 3:07-CV-00919-M, 2008 WL 282305 (N.D. Tex. Feb. 1, 2008). There, “the employer did not threaten to terminate employees who refused to sign the arbitration agreement,” and the plaintiffs “expressly acknowledged that their agreement to arbitrate was made voluntarily and without duress, pressure or coercion.” *D.R. Horton*, 357 NLRB 184, slip op. at 8, n.18 (citing *Webster*, 2008 WL 282305, at \*4). The Board stressed that this distinction — voluntary vs. mandatory — is critical. See *D.R. Horton*, 357 NLRB 184, slip op. at 12 (“We emphasize the limits of our holding and its basis”); *id.* at 12-13 (stating the decision would affect only a “small percentage” of employers, and “finding the class-action waiver unlawful will not result in any large-scale or sweeping invalidation or arbitration agreements”).

Significantly, the Board in *D.R. Horton* did not answer whether a voluntary, bilateral agreement to arbitrate any disputes arising between an employer and an employee — like the arbitration agreement here — violates the NLRA. The Board explicitly declined to address this “more difficult question”:

[W]e do not reach the more difficult question[] of . . . whether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court. (*Id.* at 13, n.28)

The Board followed suit in *Murphy Oil*, again reasoning that the class action waivers in issue violated the NLRA because they were mandatory conditions of employment:

[b]y maintaining a mandatory arbitration agreement that employees reasonably would believe bars them from filing charges with the National Labor Relations Board, and by maintaining and/or enforcing a mandatory arbitration agreement under which employees are compelled, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, the Respondent has engaged in unfair labor practices. . . (*Murphy Oil*, 361 NLRB No. 72, slip op. at 21 (emphasis added).)

The Board emphasized that only “arbitration agreements that are imposed as a condition of employment, and that compel NLRA-covered employees to pursue workplace claims against their employer individually” violate Section 8(a)(1). (*Murphy Oil*, 361 NLRB No. 72, slip op. at 2; *see also, id.* at 4 [noting complaint alleged violation of Section 8(a)(1) based on employer’s mandatory arbitration agreement, which was “condition of employment” and contained no exception for unfair labor practice charges]; *id.* at 17 (noting *Murphy Oil* and *D.R. Horton* concern the “legality of mandatory waivers of employees’ right to seek class treatment or the equivalent for their workplace claims”). The Board’s continued emphasis on the reason why the arbitration agreements in *D.R. Horton* and *Murphy Oil* violated the NLRA should not go unnoticed. According to the Board, they violate the NLRA because the employer imposed them as mandatory conditions of employment. *See, e.g., Valley Health Sys. LLC and Kathy Morris and Katrina Alvarez-Hyman*, no. 28-CA-123611, 2015 WL 1254854 (NLRB Div. of Judges, San Francisco, Mar. 18, 2015) (distinguishing *D.R. Horton* and *Murphy Oil* and finding the arbitration agreement at issue “voluntary” and therefore lawful).

The Ninth Circuit has likewise interpreted *D.R. Horton* and found that an employer does not violate the NLRA when it offers employees class action waivers but gives them the

opportunity to opt out, free of express or implied threats of retaliation. *See Johnmohammadi v. Bloomingdale's Inc.*, 755 F.3d 1072, 1075 (9th Cir. 2014) (assuming the NLRA creates a right to bring group claims, employer does not unlawfully interfere with, restrain, or coerce employees in the exercise of that right by entering into voluntary agreement to individually arbitrate workplace disputes; *see also Nanavati v. Adecco USA, Inc.*, 99 F.Supp.3d 1072 (N.D. Cal. 2015) (following *Johnmohammadi* and finding that class action waiver within arbitration agreement with 30-day opt-out provision “is not an unlawful restraint of Plaintiffs right to engage in concerted activity and is enforceable”). Moreover, once an employee has freely selected arbitration, the FAA policy favoring arbitration becomes even stronger. *See AT&T Mobility v. Concepcion*, 563 U.S. 333, 348-49 (2011) (“*Concepcion*”).

Finding that voluntary individual arbitration agreements do not violate the NLRA is consistent with the plain language of Section 7. Section 7 not only protects employees’ rights to engage in concerted activity, since 1947 it has also protected their right to refrain from engaging in such activity. 29 U.S.C. § 157 (employees “shall also have the right to refrain from any or all of such [protected] activities”); *see also Penn Plaza LLC v. Pyett*, 556 U.S. 247, 274 (2009). In addition, Section 9 of the NLRA protects the right of every employee to “present” and “adjust” grievances on an individual basis at any time. If the NLRA creates or protects a right to assert employment-related claims on a group basis — as the Board held in *D.R. Horton* and *Murphy Oil* — then the NLRA also creates and protects a right not to engage in concerted activity. *See Nijjar Realty*, 363 NLRB No. 38, at 3-4 (2015) (Member Miscimarra, dissenting).

Accordingly, because the arbitration agreement was voluntary and the law does not prohibit voluntary agreements, the arbitration agreement does not violate the NLRA.

**D. First Amendment Right To Petition Applies; RIM Cannot Be Punished For Successfully Asserting A Petition To Arbitrate Based On The Agreement Chico Voluntarily Executed<sup>9</sup>**

RIM cannot be punished for successfully petitioning the district court to compel Chico to

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<sup>9</sup> Exceptions 13-16, 21, and 22.

arbitration. RIM's motion to compel was not "objectively baseless" and RIM prevailed.

"The First Amendment provides, in relevant part, that 'Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances.'" The United States Supreme Court has long recognized that the "right to petition [is] one of 'the most precious of the liberties safeguarded by the Bill of Rights,'" and has explained that "the right is implied by "[t]he very idea of a government, republican in form." *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 524-25 (2002).) "[T]he right to petition extends to all departments of the Government," and "[t]he right of access to the courts is ... but one aspect of the right of petition." *Id.* at 525; *see also*, *Bill Johnson's Restaurants, Inc. v. NLRB* (1983) 461 U.S. 731, 741 ("The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in court is to enjoin employees from exercising a protected right").

The First Amendment protects all but a few types of acts and practices. To fall outside the First Amendment's protection, an employer's petition activity must be both "illegal and reprehensible" such that it "may corrupt the judicial process." *BE & K*, 536 U.S. at 525. In *BE & K*, the Supreme Court set forth "the standard for declaring completed suits (like that here) unlawful." *Id.* at 517. In so doing, the Court determined that even some "baseless litigation" may be entitled to First Amendment protection to preserve the "breathing space" essential to exercise First Amendment rights. *Id.* at 531. Thus, to evade First Amendment protection, litigation must be "both objectively baseless *and* subjectively motivated by an unlawful purpose." *Id.* (emphasis in original).

Even petitioning activity that interferes with employees' NLRA rights can be protected:

For example, an employer may file suit to stop conduct by a union that [it] reasonably believes is illegal under federal law, even though the conduct would otherwise be protected under the NLRA. As a practical matter, the filing of the suit may interfere with or deter some employees' exercise of NLRA rights. Yet the employer's motive may still reflect only a subjectively genuine desire to test the legality of the conduct. (*Id.* at 533.)

In such cases, the employer's suit would be protected under the First Amendment

because its motive was not improper. *Id.* at 536 (“Because there is nothing in the statutory text indicating that § 158(a)(1) must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose, we decline to do so”).

Under these standards, RIM’s Petition to Compel Arbitration was protected activity. At the time RIM filed the petition in July 2014, the Supreme Court’s decisions in *Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.*, 559 U.S. 662 (2010), *Concepcion*, 563 U.S. 333, *Compucredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012), and *American Express Co. v. Italian Colors Rest.*, 570 U.S. \_\_\_, 133 S. Ct. 2304 (2013) (“*Italian Colors*”), rendered it clear beyond any doubt that RIM was entitled to enforce its arbitration agreement in district court and that doing so would not place it in jeopardy of falling within the “unlawful objective” exception of *BE & K* and *Bill Johnson’s*. Indeed, the Fifth Circuit overruled the Board’s decision in *D.R. Horton* on December 3, 2013. *See D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013). Therefore, by the time RIM filed its Petition to Compel Arbitration on August 5, 2014, the Board’s decision in *D.R. Horton* was not the law. Multiple courts have expressly rejected the argument that bilateral arbitration agreements violated the NLRA. *See, e.g., Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 372-73 (2014), *Fardig v. Hobby Lobby Stores*, No. SACV 14-561 JVS(ANx), 2014 WL 2810025, at \*7 (C.D. Cal. June 13, 2014) (“every district court in this circuit to consider [*D.R. Horton*] has declined to follow it”). Finally, at the time RIM filed its petition, it would be another four months before the Board issued its October 28, 2014 decision in *Murphy Oil*. By then, the federal district court had ruled on RIM’s petition. (*See* JE 17 [Order dated October 7, 2014].)

In any event, since RIM prevailed on its petition in the wage Action, it must also prevail here. *See Bill Johnson’s Restaurants*, 461 U.S. at 747 (“if the employer’s case in the state court ultimately proves meritorious and he has judgment against the employees, the employer should also prevail before the Board, for the filing of a meritorious law suit, even for a retaliatory motive, is not an unfair labor practice.”). The charge should therefore be dismissed.

**E. Preemption – The FAA Compels Enforcement Of The Agreement**<sup>10</sup>

According to the United States Supreme Court, “[t]he overarching purpose of the [Federal Arbitration Act “FAA”] ... is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” *Concepcion*, 563 U.S. at 344; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (employer can require an employee to resolve individual employment-related claims, even those involving federal statutory rights, in private arbitration). The NLRB cannot ignore the FAA’s mandate:

[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task. (*Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942); *see also Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 140 (2002).)

The FAA’s impact must be given due consideration. And, as discussed below, several Supreme Court rulings, some of which have occurred since the Board’s decision in *D.R. Horton*, establish that the NRLA must yield to the FAA if the statutes are in conflict.

Congress passed the FAA with the express intention of eliminating hostility towards the enforcement of arbitration agreements. *Concepcion*, 563 U.S. at 339. The FAA provides that a written agreement to resolve disputes through arbitration “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” (9 U.S.C. § 2.) The FAA further provides that courts must stay litigation of claims to which an arbitration agreement applies, and compel arbitration pursuant to the terms of the agreement. (*See id.* §§ 3, 4.)

As the Supreme Court has repeated in numerous cases, the FAA establishes “a liberal federal policy favoring arbitration agreements.” *Concepcion*, 563 U.S. at 339. To further the

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<sup>10</sup> Exceptions 1-12 and 22.

federal policy behind the FAA, arbitration agreements must be “rigorously enforce[d]” according to their terms. *Italian Colors*, 133 S. Ct. at 2309; *see also Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 21 (1985). Based upon this strong policy, the Supreme Court has held that the parties to an arbitration agreement “may limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit with whom a party will arbitrate disputes.” *Concepcion*, 563 U.S. at 344 (internal quotation marks and citations omitted). The Congressional policy favoring arbitration applies with equal force to employment-related arbitration agreements. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

In line with this federal policy, the Supreme Court has held that arbitration agreements must be enforced according to their terms unless an exception to the FAA applies. *D.R. Horton*—and, consequently, the ALJ’s decision—relies on two such exceptions, but neither applies.

1. **The FAA’s “Savings Clause” Does Not Foreclose The Enforcement Of RIM’s Arbitration Agreement.**

Section 2 of the FAA, known as the “savings clause,” states that an arbitration agreement is subject to “such grounds that exist in law or equity for the revocation of any contract.” (9 U.S.C. § 2.) The Supreme Court has interpreted this language to permit arbitration agreements to be invalidated according to “generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue.” *Concepcion*, 563 U.S. at 339 (internal quotes omitted). Where a facially neutral defense has a disproportionate impact on arbitration, the Court has found the “savings clause” inapplicable to that defense. *Id.* at 342. The Supreme Court’s decision in *Concepcion* is instructive, and controlling, on the case at hand.

*Concepcion* involved a California statute prohibiting the enforcement of unconscionable contracts. Known as the *Discover Bank* rule, this statute had been interpreted by California courts to prohibit class waivers in most contracts. *Concepcion*, 563 U.S. at 340. Although the rule ostensibly applied to all contracts, the Supreme Court rejected the argument that it fell

within the FAA's savings clause.

The Supreme Court found the *Discover Bank* rule stood as an impermissible obstacle to arbitration. Class proceedings “sacrifice[] the principal advantage of arbitration — its informality — and make[] the process slower, more costly, and more likely to generate procedural morass than final judgment.” *Concepcion*, 563 U.S. at 348. In addition, the risks to employers would significantly increase, given the limited judicial review afforded arbitral decisions and the much higher stakes that class arbitrations present. *Id.* at 350 (“Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims”). This “unacceptable risk” would cause defendants to avoid arbitration rather than employing it as Congress intended under the FAA. *Id.* at 350-51. The Supreme Court concluded, “[r]equiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” *Id.* at 344.

The Board's rule from *D.R. Horton* and its progeny is indistinguishable from the *Discover Bank* rule and, accordingly, is fatally flawed for the same reasons. The Supreme Court's opinion in *Concepcion* provides a controlling view of how the FAA must be interpreted. The Board lacks authority to ignore controlling Supreme Court precedent. In rejecting the Board's position in *D.R. Horton*, the Fifth Circuit determined, after a detailed analysis of *Concepcion*, “that the Board's rule does not fit within the FAA's savings clause.” *D.R. Horton*, 737 F.3d at 359. By requiring the availability of class procedures, the Board's position “interferes with fundamental attributes of arbitration and, for that reason, disfavors arbitration in practice.” *Iskanian*, 59 Cal.4th at 371 (finding *Concepcion* controlling and rejecting Board's *D.R. Horton* rule).

2. **No “Contrary Congressional Command” Exists To Override The Enforceability Of RIM's Arbitration Agreement.**

Courts may invalidate an arbitration agreement is when “the FAA's mandate has been ‘overridden by a contrary congressional command in another federal statute.’” *Compucredit*, 132 S.Ct. 665 (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226

(1987)). If such a contrary command exists, it must be clearly stated in the statutory text or its legislative history, or there must be an “inherent conflict” between arbitration and the statute’s underlying purpose. *Gilmer*, 500 U.S. at 26.

Assessing whether another federal statute has overridden, or conflicts with, the FAA must occur in the proper context. In particular, “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.” *Id.* Doubts must be resolved in favor of arbitration. *Moses H. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Where a statute is “silent on whether claims under the Act can proceed in an arbitral forum, the FAA requires the arbitration agreement to be enforced according to its terms.” (*CompuCredit*, 132 S.Ct. at 673.)

The Supreme Court has consistently cited the lack of clear language in rejecting arguments that the FAA conflicts with other statutes or their goals. *See e.g., Italian Colors*, 133 S. Ct. 2304 (despite focus of Sherman Act on protecting consumers from antitrust violations and acknowledgement of the significant expense associated with proving these violations, Court found nothing in it to prohibit enforcement of class waiver under FAA); *CompuCredit*, 132 S. Ct. at 672-73 (no conflict between FAA and Credit Repair Organizations Act, despite express language in CROA giving affected individuals the “right to sue” an organization that violates the act); *Gilmer*, 500 U.S. at 27-29 (no conflict between class waiver under FAA and Age Discrimination in Employment Act, even though ADEA expressly authorizes and provides procedures for group actions).

Cases interpreting the FLSA must abide by this strict rule. In the FLSA, Congress expressly authorized group lawsuits among similarly situated employees and created a specific and unique statutory framework for the prosecution of those group or “collective” actions. *See* 29 U.S.C. § 216(b). The Circuit Courts have consistently held “collective action” provisions do not reflect the requisite clear Congressional command to override the FAA. *See e.g., Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 296-97 (2nd Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013).

The NLRA likewise lacks a clear Congressional command in invalidating arbitration. Nothing in the NLRA's language suggests, much less expressly states, Congress intended to override the FAA through the NLRA. While Section 7 protects employees' right to associate with one another, that general language does not meet the Supreme Court's standard. As the Fifth Circuit found, Section 7 "is an insufficient congressional command, as much more explicit language has been rejected in the past. Indeed, the [NLRA's] text does not even mention arbitration. By comparison, statutory references to causes of action, filings in court, or allowing suit all have been found insufficient to infer a congressional command against application of the FAA." *D.R. Horton*, 737 F.3d at 360 (citing *CompuCredit*, 132 S. Ct. at 670-71). Similarly, nothing in the legislative history of the NLRA not supports a finding that arbitration agreements should not be enforced pursuant to the FAA. *See id.* at 361.<sup>11</sup>

In the absence of clear and contrary statutory language or legislative history, the arbitration agreement may only be invalidated if an "inherent conflict" exists between the arbitration and the NLRA's "underlying purposes." *See Gilmer*, 500 U.S. at 26.

The purpose of the NLRA, as discussed above, and the right to utilize collective action procedures, such as those set forth in Section 216(b) of the FLSA, is not a substantive statutory right that would otherwise create the requisite "conflict" to invalidate an arbitration agreement. The Supreme Court addressed this very issue in *Gilmer*. *See Gilmer*, 500 U.S. at 27-29

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<sup>11</sup> The Board's interpretation of the Norris-LaGuardia Act ("NLA"), 29 U.S.C. § 101 *et seq.*, to find a conflict between the NLRA and FAA is flawed. First, the Board's view of the NLA is entitled to no deference. *D.R. Horton*, 737 F.3d at 362 n.10 ("It is undisputed that the NLA is outside the Board's interpretive ambit"). More importantly, neither the purpose nor the substance of the NLA supports the Board's position. "Congress passed the Norris-LaGuardia Act to curtail and regulate the jurisdiction of courts, not . . . to regulate the conduct of people engaged in labor disputes." *Marine Cooks & Stewards, AFL v. Panama S.S. Co.*, 362 U.S. 365, 372 (1960). To that end, the primary substantive provisions of the NLA are designed to render "yellow dog" contracts unlawful and unenforceable, and to prohibit courts from enjoining certain types of lawful conduct "involving or growing out of any labor dispute." *See* 29 U.S.C. §§ 103, 104. "Intentionally breaching one's obligations under an arbitration agreement, as defined by the FAA, cannot rationally be deemed a lawful means" under section 4 of the NLA. *Murphy Oil*, 361 NLRB No. 72, slip op. at 55 (Member Johnson, dissenting).

(permitting waiver through an arbitration agreement of the ADEA's collective action procedures, which mirror the provisions of Section 216(b) of the FLSA); *see also*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997); *Deposit Guar. Nat'l Bank*, 445 U.S. at 336 ("We view the denial of class certification as an example of a procedural ruling, collateral to the merits of a litigation, that is appealable after the entry of final judgment"). The Board is bound by these holdings and any suggestion that these procedural rights are substantive under the NLRA is similarly misplaced. The NLRA is not intended to protect a right of access to a procedural framework for class actions that did not exist at the time the NLRA was enacted. The Fifth Circuit found that argument to be of "limited force" and not persuasive. *D.R. Horton*, 737 F.3d at 362.<sup>12</sup>

The Board's position does not reflect a balancing of interests between the NLRA and FAA, but rather a dismissal of the FAA in favor of the Board's expansive interpretation of the NLRA. As Member Johnson recognized, "the Supreme Court in the last 3 years has made plain how FAA conflicts are to be resolved — the FAA prevails absent an express textual command in the other statute — and unless and until the Court changes course, [the Board is] bound by that framework." *Murphy Oil*, 361 No. 72, slip op. at 43 n.35 (Member Johnson dissenting). Further, the Board's expansive reading of the scope of Section 7 to justify trumping the FAA is precisely the type of statutory extension that the Supreme Court rejected: "[T]o say that Congress must have intended whatever departures from those normal limits advance [one statute's] goals is simply irrational. No legislation pursues its purposes at all costs." (*Italian Colors*, 133 S. Ct. at 2309 [rejecting expansive definition of federal antitrust laws that would preclude enforcement of arbitration agreement] [internal quotes omitted].) As the Fifth Circuit stated:

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<sup>12</sup> Member Miscimarra's comment in *Murphy Oil* is on-point. "When enacting the NLRA in 1935, if Congress had intended to guarantee the availability of [class-based] procedures regarding litigation of employees' non-NLRA claims, one would reasonably expect this intent to be reflected in the Act or its legislative history." *Murphy Oil*, 361 NLRB No. 72 (2014) (Member Miscimarra dissenting).

Deference to the Board cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption of major policy decisions properly made by Congress. Particularly relevant to this dispute is that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently, the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis on its immediate task. We have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA. (*D.R. Horton*, 737 F.3d at 356 [internal Supreme Court citations and quotations omitted].)

Indeed, the Board's conduct belies any claim of conflict between the NLRA and arbitration. The Board has long endorsed arbitration as an important part of the dispute resolution process within collective bargaining agreements. Even as to the narrower issue, no inherent conflict exists between the NLRA and a waiver of class procedures to pursue a non-NLRA statutory claim, such as under the FLSA.

Because there is no inherent conflict between the FAA and the NLRA, RIM's arbitration agreement must be enforced according its terms.

**F. The Board Does Not Have The Authority to Overrule Judge Walter's Order<sup>13</sup>**

As a matter of law, the NLRB does not have the authority to overrule Judge Walter's order compelling Chico to individually arbitrate his claims against the RIM. *See NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976). A court's ruling on the enforceability of an employment contract in a dispute between employee and employer is final and cannot be supplanted by the Board. *Id.* at 797-800; see also *id.* at 799 ("An implicit collateral attack, launched through the filing of charges premised on the contract, may not be entertained by the Board under the guise of different policy considerations").

As noted, Chico did not appeal Judge Walter's order compelling him to individual arbitration and he cannot now collaterally attack Judge Walter's order though his NLRB

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<sup>13</sup> Exceptions 13-17, 21 and 22.

Charge.

**G. The NLRB Complaint Is Barred Under The Doctrine Of *Res Judicata*<sup>14</sup>**

“Res judicata, also known as claim preclusion, bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action. [Citation]. The doctrine is applicable whenever there is ‘(1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between parties.’” *Owens v. Kaiser Found. Health Plan, Inc.* 244 F.3d 708, 713 (9th Cir. 2001) (citations omitted); *see also, Blonder-Tongue Labs., Inc. v. University of Illinois Foundation*, 402 U.S. 313, 323 (1971).

“When a judgment is pleaded in another jurisdiction, the question is whether the judgment is *res judicata*, and where the judgment determines a right under federal statute, “. . . that decision is ‘final until reversed in an appellate court, or modified or set aside in the court of its rendition.’” *NLRB v. Heyman* (9th Cir. 1976) 541 F.2d 796, 800 (*quoting, Stoll v. Gottlieb*, 305 U.S. 165, 170, 172 (1938)).

Principals of *res judicata* apply equally to the NLRB. For example, the Ninth Circuit found the doctrine applied in *Heyman* where “the Board was faced with the same parties; essentially the same contract issue, albeit implicitly, that existed in the district court; the same Union arguments; and the presence of a judicially decreed rescission.” *Id.* According to the Ninth Circuit, failure “to give any effect to the district court’s judgment would....defeat the intentions of Congress that alternative forums be available and that contract violations be left ‘to the usual processes of the law.’” *Id.* (*quoting, Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 513 (1962)).

The doctrine of *res judicata* compels dismissal of the complaint. First, there is an “identity of claims.” “The central criterion in determining whether there is an identity of claims between the first and second adjudications is ‘whether the two suits arise out of the same transactional nucleus of facts.’” *Owens*, 244 F.3d at 714. Indeed, the claims raised in Chico’s

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<sup>14</sup> Exceptions 13-17, 21 and 22.

charge and the NLRB's complaint are identical to those Chico raised in opposition to RIM's motion to compel arbitration in the district court. Like the NLRB here, Chico relied heavily on *D.R. Horton* in his opposition and he asserted that RIM's arbitration agreement and enforcement thereof violated the NLRA.

The doctrine's second element is also met. After the court issued its Order compelling Chico to individually arbitrate his claims (thereby rejecting Chico's *D.R. Horton* argument), Chico dismissed the action, with prejudice, pursuant to the terms of a settlement. Chico never appealed the district court's order. This amounts to an "adjudication on the merits." *See Owens*, 244 F.3d at 714. Where a dismissal with prejudice follows a settlement, as here, the settlement agreement determines the *res judicata* effect to be given the dismissal (i.e., if the settlement is intended as a complete release of all claims, like the settlement in Chico's case, the dismissal with prejudice has claim-preclusive effect. *Norfolk Southern Corp. v. Chevron, U.S.A., Inc.* 371 F.3d 1285, 1289 (11th Cir. 2004) ("The dismissal with prejudice adds *res judicata* to the release as barring recovery by the appellant") (internal quotation marks omitted).

Finally, there is an "identity or privity of parties." "Of course, [the rule does] not always require one to have been a party to a judgment in order to be bound by it." *Richards v. Jefferson County, Ala.* 517 U.S. 793, 798 (1996). Compared to its old common law meaning, "the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." *Id.* As such, the fact that the NLRB was not a "party" to Chico's wage action is not determinative. The question is whether the NLRB had its "interests adequately represented by someone with the same interests who is a party." *Id.* It unquestionably did.

Chico's interest in opposing RIM's motion to compel arbitration was nearly identical to, if not exactly the same as, the NLRB's. In fact, Chico filed his NLRB charge in the midst of the parties' fight over RIM's petition to compel and before the district court ruled on it. Thereafter, the NLRB's investigation and prosecution of its complaint proceeded simultaneously with Chico's prosecution of the wage action. Chico and the NLRB cooperated in this endeavor.

Chico, of course, was a party in both cases and participated in all aspects of the NLRB action. He was represented by the same counsel in both the federal action and at the NLRB hearing; Chico's counsel even cross-examined one of RIM's witnesses. And, in connection with the motion to compel arbitration, Chico asserted the same *D.R. Horton*-based arguments asserted by the NLRB here, seeking basically the same relief. As such, Chico and his counsel fully and adequately "represented" the NLRB's "interests" in the federal action. Simply because they did not agree with the result in that forum does not mean they are entitled to a second "bite at the apple." This is exactly the type of successive litigation and legal attack the doctrine of *res judicata* is meant to stop.

**G. Chico's NLRA Claim is Untimely**<sup>15</sup>

Section 10(b) of the NLRA states: "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . ." Based on *D.R. Horton*, the alleged unfair labor practice occurred when Chico became subject to the arbitration agreement, not at a later date when he was terminated, filed his class action, or was compelled to arbitrate. *D.R. Horton* states:

In this case, we consider whether an employer violates Section 8(a)(1) of the National Labor Relations Act when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial. (*D.R. Horton*, 357 NLRB 184, slip op. at 1.)

This language establishes that the Board's focus is on the employer's alleged misconduct in allegedly requiring employees to execute arbitration agreements. As noted, above, Chico executed the arbitration agreement at issue in this charge on October 5, 2011. The time for Chico to file a charge thus expired on about April 5, 2012, approximately five months before he filed this charge.

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<sup>15</sup> Exceptions 18-20.

**H. Chico Incurred No Attorneys' Fees Opposing RIM's Motion to Compel Arbitration And, Accordingly, The ALJ Erred In Ordering RIM to Pay Such Fees.<sup>16</sup>**

Chico's counsel in the Central District litigation represented him on a contingency fee basis. That litigation concluded with a settlement agreement, from which Chico's counsel presumably was paid his percentage contingency fee. Because Chico's counsel represented him on a contingency basis, Chico did not incur any attorney's fees in opposing RIM's motion to compel arbitration in the Central District litigation. Accordingly, there are no attorneys' fees for RIM to pay.

**IV. CONCLUSION**

For the reasons set forth herein, the Board should not adopt the ALJ's decision. Instead, it should dismiss all charges against RIM.

Respectfully submitted,

Dated: July 13, 2016

LONG & LEVIT LLP

By: 

Douglas J. Melton  
Shane M. Cahill

ATTORNEYS FOR RESPONDENT  
RIM HOSPITALITY

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<sup>16</sup> Exceptions 23 and 24.

**PROOF OF SERVICE**

I, the undersigned declare:

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 465 California Street, 5th Floor, San Francisco, California 94104.

On July 13, 2016, I served the within document(s):

**BRIEF IN SUPPORT OF RESPONDENT RIM HOSPITALITY'S EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

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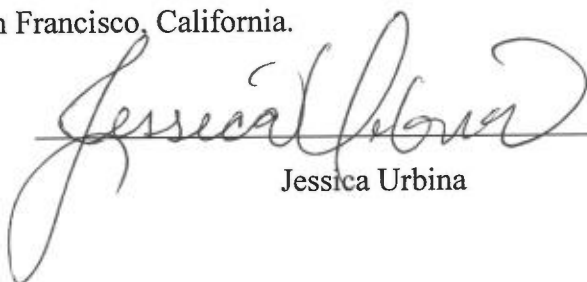
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I electronically filed the above-mentioned document with the Regional Office of the NLRB. Executed on July 13, 2016, at San Francisco, California.

  
Jessica Urbina